IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON PLAINTIFF

V. CIVIL ACTION NO.: 2:07CV42 WAP-EMB

ONE AMERICA PRODUCTIONS, INC.,
EVERYMAN PICTURES, TWENTIETH
CENTURY-FOX FILM CORPORATION
and JOHN DOES 1 AND 2 DEFENDANTS

MOTION OF DEFENDANTS
TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendants One America Productions, Inc. and Twentieth Century Fox Film Corporation[1] move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Complaint of Plaintiff Ellen Johnston in its entirety because the factual allegations of the Complaint fail to state a claim upon which relief may be granted. In support, Defendants present the following:

1. Plaintiff's suit relates to her very brief appearance in the award-winning movie titled "BORAT - Cultural Learnings Of America For Make Benefit Glorious Nation Kazakhstan." She alleges that the Defendants invaded her privacy by including in the film her image "with her arms raised above her head praising the Lord." Plaintiff is one of many worshippers captured in a crowd scene shot at a Pentecostal camp meeting.[2] Plaintiff appears for less than three seconds in this 84-minute film, is not identified by name, and does not speak on

[1] Plaintiff voluntarily dismissed Defendant Everyman Productions, Inc. on June 1, 2007. See Notice of Dismissal (June 1, 2007); Docket 6.

[2] The movie is a series of vignettes connected only by the title character Borat's travel across the United States. The camp meeting is depicted in the DVD of the film at scene 20. See DVD of film, "BORAT"; Exhibit 2 to Defendant's Motion to Dismiss (June 20, 2007). A copy of Exhibit 2 has been filed with the Clerk of the District Court by Notice of Conventional Filing (June 20, 2007).

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film. She was aware a camera crew was filming what happened at the camp meeting. She seeks compensatory damages of $100,000.00 and punitive damages of $500,000.00. Complaint 2 (March 19, 2007); Docket 1.

2. Johnston alleges that she is domiciled in Mississippi and that the movie "Borat" was shown here. Thus, Defendants assume for the purposes of this Motion only that the laws of Mississippi apply in this diversity action. *See Davis v. Nat'l Gypsum Co.,* 743 F.2d 1132 (5th Cir. 1984) (in tort actions Mississippi applies the law of the state where the injury occurred, unless another state has a more substantial relationship to the action); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 153 (1971) (in an alleged invasion of privacy based on a motion picture, the law of the state of the plaintiff's domicile will ordinarily apply if the matter complained of was published there).

3. For purposes of this Motion, Plaintiff is entitled to have the District Court accept the well-pleaded factual allegations of the Complaint; but, "formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atl. Corp. v. Twombly,* 127 S. Ct. 1955, 1965 (2007). The pleading must show "plausible liability"; a "mere possibility" that plaintiff is entitled relief is not enough. *Id.* And the factual allegations must be "enough to raise a right to relief above the speculative level." *Id.*

4. Mississippi law separates the invasion of privacy tort into four subclasses, namely, (a) false light; (b) disclosure of private facts; (c) intrusion upon seclusion; and (d) appropriation of one's name or image for commercial purposes. S*ee Deaton v. Delta Democrat Pub. Co.,* 326 So. 2d 471, 473 (Miss. 1976). Privacy claims are subject to the same legal principles and defenses as claims for defamation. E.g., *Prescott v. Bay St. Louis Newspapers, Inc.,* 497 So. 2d 77, 81 (Miss. 1986).

5. Johnston's Complaint does not clearly articulate the type (or types) of privacy claim she asserts, but her Complaint fails to include factual allegations necessary for recovery under any one of the four privacy torts recognized in Mississippi.

False Light

6. Johnston has not identified any statements in the movie “clearly directed” at her. Although Plaintiff alleges that the character Borat “mocks her religion,” she cannot recover on a privacy claim based upon statements about her church.

7. The Complaint does not identify any false statement about, or false image of, Plaintiff. She is depicted in the scene worshipping in a manner consistent with the Pentecostal faith. Plaintiff’s allegation that she believed the footage from the camp meeting would be used in a “religious documentary” does not make the depiction of her false in any way.

8. The Complaint does not identify any statement about or image of Plaintiff that is highly offensive to a reasonable person. The participants in the church camp meeting are shown as being open to foreigners, warm, friendly, compassionate, sincere in their beliefs, and as having an appropriate sense of humor.

Disclosure of Private Facts

9. Any claim for the embarrassing disclosure of private facts fails because Johnston is depicted at a public gathering, engaged in an act of worship wholly consistent with the Pentecostal faith. The facts that she attended the camp meeting and raised her hands in the air are not “private” and their disclosure would not be “highly offensive” to a reasonable person.

Intrusion Upon Seclusion

10. Any claim for intrusion upon seclusion fails because, according to the Complaint, Johnston is participating in a public worship service; Defendants did not interfere with her seclusion. Plaintiff knew that the service and those attending it were being filmed, and consented to that filming when she remained in the facility.

Commercial Appropriation of Image

11. The incidental use of Johnston's image for less than three seconds in the 84-minute film, an expressive work protected by the First Amendment, cannot as a matter of law constitute an actionable appropriation of her image or likeness for advertising or commercial purposes.

12. In support of their Motion, Defendants rely upon the following materials:

(a) Complaint (March 20, 2007), attached as Exhibit 1;

(b) DVD of the motion picture film, "BORAT - Cultural Learnings Of America For Make Benefit Glorious Nation Kazakhstan", which is being filed with the District Court and served on counsel for Plaintiff by Notice Of Conventional Filing, as Exhibit "2"; and

(c) Transcript of the church camp episode, which includes the only crowd scene depicting Plaintiff, attached as Exhibit “3”; and

(d) Copies of the entry for “Pentecostals” from D. Barrett, *World Christian Encyclopedia* (Oxford University Press 1982) (including photograph of Pentecostals with hands raised in the air) and Chapter 21, “Pentecostal and Charismatic Worship” from G. Wainwright & K. Tucker, *The Oxford History of Christian Worship* (Oxford University Press 2006), attached as collective Exhibit 4.

Defendants also rely on their accompanying Memorandum of Law, which is incorporated herein by reference.

WHEREFORE, Defendants One America Productions, Inc., and Twentieth Century Fox Film Corporation respectfully request that their Motion to Dismiss be granted in its entirety; that the Complaint be dismissed with prejudice and costs assessed to Plaintiff; and that they be granted any other general or special relief as may be appropriate.

THIS, the 20th day of June, 2007.

Respectfully submitted,

ONE AMERICA PRODUCTIONS, INC., AND TWENTIETH CENTURY FOX FILM CORPORATION

s/ John C. Henegan
John C. Henegan, MB No. 2286
Donna Brown Jacobs, MB No.8371

Attorneys for Defendants

OF COUNSEL:

BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC
17th Floor, AmSouth Plaza
210 East Capitol Street
Post Office Box 22567
Jackson, MS 39225-2567
T: (601) 948-5711
F: (601) 985-4500

CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, hereby certify that I have this day filed the above and foregoing MOTION OF DEFENDANTS TO DISMISS FOR FAILURE TO STATE A CLAIM with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
wol@lucketttyner.com

ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 20th day of June, 2007.

s/ John C. Henegan
JOHN C. HENEGAN

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